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No. 87-1953

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

CONTINENTAL INSURANCE COMPANIES,
Plaintiff-Respondent,

vs.

NORTHEASTERN PHARMACEUTICAL AND CHEMICAL COMPANY, INC., et al.,
Defendants,

and

STATE OF MISSOURI,
Intervenor-Petitioner.

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES II

ARGUMENT AND AUTHORITIES—

I. The Eighth Circuit jeopardized the ability of state and federal governments to recover response costs under the Comprehensive Environmental Response, Compensation and Liability Act in a manner which circumvents fundamental principles of justice 1

II. The Eighth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for this Court's supervision 3

A. The Eighth Circuit violated its duty under *Erie* and imposed the law of foreign jurisdictions on the state of Missouri 3

B. The Eighth Circuit denied the State the opportunity to be heard, contrary to the basic notions of fairness described by this Court in *Celotex Corp. v. Catrett* 4

III. The Eighth Circuit decision conflicts with decisions of other federal courts of appeals 7

IV. The national importance of CERCLA cost recovery actions renders the Eighth Circuit's abandonment of applicable substantive and procedural law particularly significant 8

TABLE OF AUTHORITIES

Cases

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 2, 4, 5-6, 7

Continental Insurance Cos. v. Northeastern Pharmaceutical & Chemical Co., et al., 842 F.2d 977 (8th Cir. 1988) (*en banc*) 1, 9, 10

Eagle-Picher Indus., Inc. v. Liberty Mut. Ins., 682 F.2d 12 (1st Cir. 1982) 2

Eli Lilly & Co. v. Home Ins. Co., 794 F.2d 710 (D.C. Cir. 1986), *cert. denied*, ... U.S. ....., 107 S.Ct. 940 (1987) 2, 7

Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) 2, 3, 8

Insurance Co. of North America v. Forty-Eight Insulations, 633 F.2d 1212 (6th Cir. 1980) 2

Intel Corp. v. Hartford Acc. & Indem. Co., N.D. Cal., No. C-87-20434-RPA (1988) 9

Keene Corp. v. Insurance Co. of North America, 667 F.2d 1034 (D.C. Cir. 1981) 2, 7

Maryland Cas. Co. v. Armco, Inc., 822 F.2d 1348 (4th Cir. 1987) 2

McGraw Edison Credit Corp. v. Motorola Communications and Electronics, Inc., 579 F.2d 885 (5th Cir. 1978) 7-8

National Aviation Underwriters, Inc. v. Altus Flying School, 555 F.2d 778 (10th Cir. 1977) 7

Porter v. American Optical Corp., 641 F.2d 1128 (5th Cir. 1981) 2

The Travelers Ins. Co. v. Ross Elec. of Washington, 685 F.Supp. 742 (W.D. Wash. 1988) 9

Statutes and Rules

Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601 *et seq.* and the following section thereof: 107(a) (42 U.S.C. § 9607(a)) 1, 9

Supreme Court Rule 17.1(a) 3, 7

Federal Rule of Civil Procedure 56 ..... 5, 6

Other Authorities

3 Toxics L. Rep. (BNA) 1338-39 (May 4, 1988) 9-10

3 Toxics L. Rep. (BNA) 150-51 (June 29, 1988) 9

I. THE EIGHTH CIRCUIT JEOPARDIZED THE ABILITY OF STATE AND FEDERAL GOVERNMENTS TO RECOVER RESPONSE COSTS UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT IN A MANNER WHICH CIRCUMVENTS FUNDAMENTAL PRINCIPLES OF JUSTICE.

Petitioner seeks review of the Eighth Circuit's opinion in *Continental Insurance Cos. v. Northeastern Pharmaceutical & Chemical Co., et al.*, 842 F.2d 977 (8th Cir. 1988) (*en banc*) (*"NEPACCO"*). The underlying action represents the effort of 139 insurance companies to deny the State of Missouri the opportunity to recover its environmental response costs under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601 *et seq.* ("CERCLA"). Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), permits state and federal governments to recover environmental response costs from parties responsible for the contamination. Frequently, as in *NEPACCO*, responsible parties' insurers are the only solvent parties from which governments may recover their costs. The Eighth Circuit's opinion forecloses that option, jeopardizing the ability of state and federal governments to recover environmental clean-up costs.

Respondent asserts this case is not worthy of review because this Court has denied review in insurance coverage cases. The issues presented in this petition, however, involve important fundamental principles unrelated

to insurance coverage. As discussed below, the Eighth Circuit reached its important decision in a manner which exceeded the bounds of *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), by denying the State an opportunity to be heard, and which defied *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), by imposing the substantive law of other jurisdictions on the State of Missouri. Missouri state courts will never have the opportunity to state the correct application of Missouri law to CERCLA cost recovery claims because such claims arise under federal law and related insurance claims typically are brought in, or removed to, federal courts based on diversity of citizenship. This decision will affect not only insurance coverage cases, but also other diversity actions and summary judgment proceedings in the federal courts.

Moreover, "similar" cases cited by Respondent are not dispositive. Four of the six cases did not involve summary judgment.[1] These courts reviewed the district courts' finding *after* a thorough inquiry into interpretation of the policy terms. The other two cases support the State's position that the affirmance of summary judgment is proper only after the necessary factual record has been established.[2]

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1. *Maryland Cas. Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987); *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins.*, 682 F.2d 12 (1st Cir. 1982); *Porter v. American Optical Corp.*, 641 F.2d 1128 (5th Cir. 1981); *Insurance Co. of North America v. Forty-Eight Insulations*, 633 F.2d 1212 (6th Cir. 1980).

2. *Keene Corp. v. Insurance Co. of North America*, 667 F.2d 1034, 1052 (D.C. Cir. 1981) (reversal of summary judgment because insufficient facts to permit interpretation of the insurance policy term); *Eli Lilly & Co. v. Home Ins. Co.*, 794 F.2d 710 (D.C. Cir. 1986) (court certified contract interpretation issue to the Indiana Supreme Court for proper resolution).

II. THE EIGHTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR THIS COURT'S SUPERVISION.

Supreme Court Rule 17.1(a) permits this Court to grant a writ of *certiorari* when a federal court of appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." The Eighth Circuit so acted in two important respects: (A) it did not comply with *Erie* and (B) it affirmed summary judgment, without a hearing or affording the parties an opportunity to submit relevant materials, on a basis unsupported by the record.

A. THE EIGHTH CIRCUIT VIOLATED ITS DUTY UNDER ERIE AND IMPOSED THE LAW OF FOREIGN JURISDICTIONS ON THE STATE OF MISSOURI.

Respondent notes that this Court does not review federal appellate courts' decisions on matters of state law. The State does not challenge the Eighth Circuit's *interpretation* of state law.[3] The State seeks review of the Eighth Circuit's failure to *apply* that law.

The Eighth Circuit noted that outside the insurance context, the term "damages" is ambiguous and, from the viewpoint of the lay insured, "damages" reasonably could

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3. Indeed, the Court of Appeals correctly stated the relevant law of Missouri reciting that "language used will be viewed in light of the meaning that would ordinarily be understood by the lay [person] who bought and paid for the policy." Appendix to Petition for Writ of *Certiorari* at A17.

include all monetary claims. Appendix to Petition for Writ of *Certiorari* at A17-18. Missouri law required the court to view the term "damages" in light of that meaning.

The Eighth Circuit held nevertheless that the term "damages" has an accepted technical meaning in the insurance context which is not ambiguous and which excludes environmental cost recovery claims. The court applied that technical meaning to the contracts at issue. The court cited only the law of Maryland, Florida and New Hamphire to support its conclusion. Appendix to Petition for Writ of *Certiorari* at A18. It is inconceivable that the Eighth Circuit's holding could be construed as an application of Missouri law, nor may the court's conclusion realistically be characterized as a declaration of what the court believes the state law to be.

Unless this Court issues the requested writ, this application of foreign law to Missouri will forever go uncorrected. Because such actions typically arise in or are removed to federal courts, the State will be powerless to seek recovery in state courts.

B. THE EIGHTH CIRCUIT DENIED THE STATE THE OPPORTUNITY TO BE HEARD, CONTRARY TO THE BASIC NOTIONS OF FAIRNESS DESCRIBED BY THIS COURT IN CELOTEX CORP. v. CATRETT.

The present case presents an opportunity for this Court to clarify the scope of its decision in *Celotex Corp. v. Catrett*, 477 U.S. 317. While this Court there recognized the vitality and propriety of summary judgment, the decision below expands appellate courts' power to affirm summary judgment in a manner that assuredly was not

contemplated by this Court in *Celotex*. This expansion, so soon after this Court's favorable view of summary judgment in *Celotex*, makes it imperative that this Court now clarify the upper limits of summary judgment authority.

Respondent correctly notes that courts properly may affirm summary judgment on a ground different from that on which the trial court relied. The State here disputes instead the Eighth Circuit's entry of summary judgment without any factual record supporting the basis chosen for decision, and without affording the parties an opportunity, required by Federal Rule of Civil Procedure 56, to make such a record. Petition for Writ of *Certiorari* at 11-13. Authorities Respondent cites all reflect an affirmance that is supported by the record.

There is no support in the record for the court's finding that "damages" has a particular, technical meaning in the insurance industry which excludes environmental response costs. Indeed, the record belies such a conclusion: the insurers below repeatedly referred to the State's claims as claims for "damages." Petition for Writ of *Certiorari* at 6, n.10. The court extracted its conclusion from the opinions of courts of other jurisdictions—opinions reached without any evidentiary hearing. Because the case law is sharply divided regarding the scope of the term "damages" (*See* Appendix to Petition for Writ of *Certiorari* at A17, 25-26), the court's finding cannot fairly be classified as a well-established principle of insurance law.

The *Celotex* opinion stresses the importance of fairness in summary judgment proceedings. First, the non-moving party must have adequate time for discovery to come forward with evidence of a factual dispute. 477 U.S. at

322. Second, the moving party must inform the court of the basis of its motion and identify those portions of the documents on file which demonstrate the absence of a genuine issue of material fact. 477 U.S. at 323. Third, before a District Court enters summary judgment *sua sponte*, the losing party must be put on notice and have the opportunity to come forward with all evidence. *Id.* Fourth, in discussing potential problems with premature summary judgment motions, this Court recognized a trial court's power to deny summary judgment or continue the hearing if the non-moving party has not had an opportunity to make full discovery. 477 U.S. at 325.

All of these considerations reflect the importance of fairness in summary judgment proceedings. They reflect that fairness requires that the non-moving party have the opportunity to discover and present evidence of a factual dispute. Fairness requires the opportunity to be heard.

Fairness is preserved if an appellate court affirms summary judgment on a basis supported by the record because the record confirms notice and the opportunity to be heard. When a court affirms summary judgment on a basis not raised until appeal, and for which there is no support in the record, the non-movant's opportunity to be heard is foreclosed. The problem is particularly acute here because evidence contrary to the court's finding exists[4]—evidence which the court's Rule 56 procedures foreclosed the State from presenting.

Instead of addressing these issues, respondent claims that the drafting history proffered by the State is irrelevant

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4. See Petition for Writ of *Certiorari* at 15-18 and Appendix thereto at A106-24.

and totally unrelated to the case. Yet no better evidence exists of an industry's intended meaning of standard-form policies than its own drafting history.

Respondent's suggestion that extrinsic evidence is admissible when a contract is unambiguous assumes the Eighth Circuit properly could rule on ambiguity *without* evidence of intent. The Eighth Circuit's recognition of a lay interpretation in conflict with a claimed technical understanding mandates the inquiry into intent. This is especially true in Missouri where state law requires deference to the lay insured's understanding of policy terms.

Even if this evidence were inadmissible, production of admissible evidence is not necessary to avoid summary judgment. *Celotex*, 477 U.S. at 323. Moreover, the State is not asking this Court to make a factual determination. The State intends only to assure this Court that remand for a factual hearing will not be fruitless.

III. THE EIGHTH CIRCUIT DECISION CONFLICTS WITH DECISIONS OF OTHER FEDERAL COURTS OF APPEALS.

Supreme Court Rule 17.1(a) permits this Court to grant a writ of *certiorari* when a federal court of appeals "has rendered a decision in conflict with the decision of another federal court of appeals on the same matter." As discussed above, the Eighth Circuit opinion directly conflicts with opinions from the District of Columbia Circuit. *See, Keene Corp.* and *Eli Lilly, supra.* In addition, in *National Aviation Underwriters, Inc. v. Altus Flying School,* 555 F.2d 778, 783 (10th Cir. 1977), the Tenth Circuit held summary judgment improper in a nearly identical fact situation. Similarly, in *McGraw Edison Credit Corp. v. Motorola Communications and Electronics,*

Inc., 579 F.2d 885, 886 (5th Cir. 1978), the Fifth Circuit held that summary judgment was improper in contract interpretation because of the factual inquiry necessary to determine the parties' intent.

IV. THE NATIONAL IMPORTANCE OF CERCLA COST RECOVERY ACTIONS RENDERS THE EIGHTH CIRCUIT'S ABANDONMENT OF APPLICABLE SUBSTANTIVE AND PROCEDURAL LAW PARTICULARLY SIGNIFICANT.

Respondent claims that the State merely invites social engineering, rather than adherence to *Erie*, by presenting issues of material and substantial importance to governments seeking to recover environmental response costs under CERCLA. The respondent boldly asserts that the State asks this Court to dispense with contract terms and contract law and require deep-pocket insurance companies to financially support the State.

The State emphasized the importance of this case to require compliance with *Erie* and established summary judgment procedure. Environmental contamination is an important and expensive national concern. State and federal funds available for remedial action are not unlimited and depend on cost recovery actions for replenishment. Often, responsible parties' insurers are the only viable source of cost recovery. Because environmental response cost recovery is so important it should not be denied without compliance with the applicable substantive and procedural law. The State does not request that this Court obligate deep-pocket insurance companies to provide state governments with financial support. Rather, the State requests that this Court require

the Court of Appeals to comply with the *Erie* doctrine and Rule 56 summary judgment procedures.

Respondent attempts to minimize the significance of this decision by noting numerous other courts have reached similar conclusions. The existence of this case law, however, does not render the Eighth Circuit's decision substantively or procedurally correct.[5] If left to stand, *NEPACCO* will become the foremost authority cited by courts throughout the nation to deny states recovery, authorized by 42 U.S.C. § 9607, of environmental response costs associated with hazardous waste sites within their borders. The Eighth Circuit's reliance on the law of other jurisdictions suggests this prediction will become a reality.

Contrary to the insurers' assertion, this opinion already has broadly affected and will continue to affect decisions across the country where other state governments, and even the federal government, seek to enforce their federal rights to funding assistance for correcting environmental hazards. *The Travelers Ins. Co. v. Ross Elec. of Washington,* 685 F.Supp. 742 (W.D. Wash. 1988) (following *NEPACCO*); 3 Toxics L. Rep. (BNA) 150-51 (June 29, 1988) (discussing *Transport Indem. Ins. Co. v. Argonaut Ins. Co., Inc.,* Cal. Super. Ct., San Mateo Co., No. 262425, in which California state trial court summarily denied insurance coverage for CERCLA response costs; insurers cited *NEPACCO* to support summary judgment motion). *See also, Intel Corp. v. Hartford Acc. & Indem. Co.*, N.D. Cal., No. C-87-20434-RPA (April 26, 1988) (considered but declined to follow *NEPACCO*). The decision's impact on the federal government's ability to recover response costs already is being felt. 3 Toxics L. Rep. (BNA)

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5. Moreover, the present case does not involve injunctive relief or purely economic damage and, therefore, is distinguishable from cases Respondent cites.

1338-39 (May 4, 1988) (discussing *Independent Petrochemical Corp. v. Aetna Casualty & Surety Co.*, U.S. District Court for the District of Columbia, No. 83-3347, in which insurers seek reconsideration of a March 2, 1988 order granting the United States permission to intervene in declaratory judgment action in light of *NEPACCO*). If *certiorari* does not issue here, this impact will continue to grow.

The present case represents a monstrous, unprecedented departure from governing substantive and procedural law. The Eighth Circuit ignored Missouri law and denied the State the opportunity to be heard or to demonstrate the existence of a factual dispute on the very issue on which summary judgment was ultimately entered. These actions undermine the basic concept of fairness so fundamental to our judicial system and so conflict with this Court's previous opinions as to require this Court's intervention.

WHEREFORE, the State of Missouri prays this Court grant the State's petition for *certiorari* to review the Eighth Circuit's judgment.

Respectfully submitted,

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